No._____

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE

G. Walter Swain,
Appellant,

vs.

Delaware Department of Natural
Resources and Environmental Control,
Respondent.

RESPONDENT'S BRIEF ON APPEAL OF G. WALTER SWAIN UNDER THE COASTAL ZONE MANAGEMENT ACT

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ATTORNEYS FOR RESPONDENT

Dated: April 3, 2008

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STATEMENT OF THE CASE

Appellant, G. Walter Swain, applied to the Delaware Department of Natural Resources and Environmental Control ("Department") for state permits needed to construct a 50-slip, commercial marina on his property and state subaqueous lands on Cedar Creek and Mispillion River, Milford, Delaware. Appellant also applied for the necessary federal permit for which he was required to submit a coastal zone consistency certification. Pursuant to the federal regulations, appellant submitted the consistency certification to the Department, which objected to the project as not being consistent with the Coastal Zone Management Act and the enforceable policies of the Delaware Coastal Management Program.

Appellant now appeals the objection of the Department on the basis that the objection should be overridden on procedural and substantive grounds. Appellant's arguments are without merit, and the objection to appellant's consistency certification should be upheld. The Department complied with the procedural requirements of the CZMA, the corresponding federal regulations, and the enforceable policies of the Delaware Coastal Management Program. The Department's objection was based on scientific evidence that appellant's proposed marina would create adverse environmental effects to the area's wildlife and habitat that cannot be outweighed by any of the project's marginal public benefits, if any.

STATEMENT OF FACTS

On April 14, 2005, appellant, G. Walter Swain, filed an application with the Delaware Department of Natural Resources and Environmental Control ("Department") for a subaqueous lands lease, marina permit, and water quality certification for a proposed marina ("project") on Cedar Creek and the Mispillion River, Milford, Delaware.[1] On the same date, appellant applied for the necessary federal permit.[2] On April 26, 2005, the Department's Delaware Coastal Management Program ("DCMP") received appellant's certification that the project was consistent with the enforceable policies of the DCMP.[3] On May 25, 2005, the DCMP advised appellant in writing that it did not have all the necessary data and information required to initiate the review and made specific requests for additional information.[4]

Despite follow-up correspondence from the DCMP, appellant did not respond to the request for additional information until almost seven months later. Appellant finally responded in a letter dated January 12, 2006,[5] which the DCMP received on January 17, 2006. The DCMP acknowledged receipt of appellant's submission on January 31, 2006 and advised appellant that the project would be publicly noticed, thereby starting the review period.[6] The DCMP advised appellant that its review deadline was April 17, 2006.[7] This three-month deadline was self-imposed by the DCMP and was not binding according to the federal regulations. Less than a month before the end of the review period, on March 23, 2006, the DCMP wrote to appellant and advised him that more

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[1] Appellant's Ex. A.
[2] Appellant's Ex. B.
[3] Respondent's Ex. 1.
[4] Appellant's Ex. D.
[5] Appellant's Ex. F.
[6] Appellant's Ex. G.
[7] *Id.*

information was required and extended the review period for three months until July 17, 2006, the statutory deadline.[8]

On June 30, 2006, the DCMP wrote to appellant and advised that it was the DCMP's understanding, based on discussions with the Department's Wetlands and Subaqueous Lands Section ("Wetlands Section"), that the project was undergoing revisions in connection with the state permitting process.[9] (The Wetlands Section is a subdivision of the Department's Division of Water Resources.) Because the project revision would not be completed by July 17, 2006, the end of the statutory six-month review period, the DCMP would not be in a position to evaluate the project's consistency.[10] Appellant was advised that he could either stipulate to a stay, or the DCMP would be obligated to object to the project for lack of information.[11] Appellant's consultant, David Hardin, agreed to stay the review. On July 13, 2006, before the end of the statutory six-month review period, Hardin executed the written agreement.[12] The terms gave appellant 90 days from the date of the agreement to provide additional information. If more time was needed, appellant could request an extension. Once the requested information was received, the DCMP would analyze that information and then provide its determination when it received the Division of Water Resources' decision regarding the state permits.

On July 14, 2006, the DCMP received some, but not all of the information requested from appellant.[13] On September 29, 2006, the DCMP wrote to appellant and

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[8] Appellant's Ex. H.
[9] Appellant's Ex. I.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Respondent's Ex. 2.

reminded him that the 90-day deadline for information was October 16, 2006.[14] On October 14, 2006, Hardin wrote to the DCMP and requested a 30-day extension.[15] The DCMP agreed to Hardin's request for an extension in a telephone conversation. On November 16, 2006, the DCMP received the remainder of the requested information from appellant.[16] Although the appellant fulfilled one aspect of the stay agreement, the DCMP could not, according to the terms of the stay agreement itself, issue a determination until the Division of Water Resources completed its permit review. On January 3, 2008, the Division of Water Resources denied Swain's application for a subaqueous lands lease, marina permit, and water quality certification,[17] and, on the same day, the DCMP objected to appellant's coastal zone consistency determination.[18]

ARGUMENT

I. DNREC Complied with the Coastal Zone Management Act and Regulations, and DNREC's Objection to Appellant's Consistency Certification Should Not be Dismissed.

Since the DCMP's first contact with the appellant, the DCMP has met every statutory and regulatory deadline and, in the cooperative spirit of the regulations, has accommodated appellant's request for a deadline extension.

On May 25, 2005, within thirty days after receiving appellant's consistency certification, the DCMP acknowledged its receipt and requested additional necessary data and information from the appellant. The DCMP also informed appellant that the review period would not commence until appellant provided information required to satisfy the

[14] Appellant's Ex. K.
[15] Appellant's Ex. L.
[16] Respondent's Ex. 3.
[17] Respondent's Ex. 4.
[18] Appellant's Ex. R.

CZMA regulations and the enforceable policies of the DCMP. Appellant did not provide the requested information for more than seven months. During that period, the DCMP wrote to appellant, reminding him that the requested information had not been received. The DCMP also spoke to appellant's consultant on the telephone and provided a detailed, follow-up email identifying the project's inconsistencies with the DCMP's policies and offering possible options.[19]

On January 17, 2006, the DCMP finally received appellant's response to the Department's request for necessary information and data in a letter. The DCMP acknowledged receipt of submission on January 31, 2006, well within the thirty-day notification period,[20] and advised appellant that the project would be publicly noticed for thirty days. Although the DCMP had six months to review appellant's consistency certification, it set an initial, non-binding three-month review deadline of April 17, 2006.

On March 23, 2006, when the DCMP determined that it still needed more information to complete a substantive review, the DCMP complied with the CZMA regulations[21] and advised appellant that the review would be extended for ninety days to the full six-month review deadline. As the six-month deadline approached, the DCMP determined that it could not complete it review, because the project was undergoing revisions in conjunction with the Wetlands Section, and, consequently, the DCMP required additional information related to the revisions.[22] Instead of objecting to the appellant's consistency certification for insufficient information,[23] the DCMP offered to

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[19] Appellant's Ex. E.
[20] 15 C.F.R. § 930.60(a)(3).
[21] § 930.62(b).
[22] Appellant's Ex. I.
[23] § 930.64(c)(emphasis added).

> A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to §

stay the review period in order to provide appellant with the opportunity to provide the information related to the project revisions. The stay would also give the appellant more time to submit the information requested on March 23, 2006. The DCMP also requested additional information related to the project's consistency with the DCMP's enforceable policies.

Rather than forcing a State to oppose a consistency certification for lack of information, the CZMA regulations give the parties the flexibility to stay a State's review of a consistency certification if the parties (1) mutually agree in writing to stay the six-month consistency review period; (2) state a specific date when the stay will end; and (3) provide a copy of the agreement to the Federal agency.[24] In this case, the DCMP and appellant reduced the terms of the stay agreement to writing, and appellant's consultant, David Hardin, signed the agreement on behalf of appellant.[25] A copy of the agreement was sent to Kevin Faust of the U.S. Army Corps of Engineers. The terms of this agreement are as follows:

> 1) The applicant will submit the above referenced information and project modifications to the DCMP within 90 days of the date of this letter. If the applicant requires longer than 90 days to provide the additional information, the applicant will be required to provide written notification the DCMP which will include justification for the additional time and a date upon which the applicant will be able to provide the information. The DCMP will agree to any reasonable request for extended time periods.

930.58 ***or other information necessary for the State agency to determine consistency***. If the State agency objects on the grounds of insufficient information, the objection shall describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program. The objection may describe alternative measures (if they exist) which, if adopted by the applicant, may permit the proposed activity to be conducted in a manner consistent with the enforceable policies of the management program.

[24] § 930.60(b).

[25] Appellant's Ex. I.

2) If the applicant fails to submit the information within the agreed upon time frame, the DCMP will be forced to object to the project based on insufficient information (15 CFR § 930.64(d)).[26] If at some future date the information is completed, then the applicant will be required to submit the information along with a *new* consistency certification to our office.

3) The project will then be subject to the full 180-day time period allotted to the DCMP through 15 CFR Part 930 Subpart D for review.

4) If the requested information is received within the time frame outlined above, the DCMP will defer a decision on the federal consistency certification until the DNREC Division of Water Resources issues or denies their permit for this project.

5) Federal Consistency concurrence will not be presumed on July 17, 2006.

Contrary to appellant's claim, the hold was not indefinite and expressly preempts presumptive concurrence. The stay agreement establishes mutual deadlines. The appellant was required to submit the information requested in the DCMP's June 30, 2006 letter within 90 days, and, if needed, the DCMP would agree to a reasonable, written request for an extension of time. In fact, on October 14, 2006, appellant requested a thirty-day extension,[27] which the DCMP approved.[28] Having taken advantage of the "extension provision" of the stay agreement, it seems reasonable that appellant be bound by all the terms of the agreement, including the express preemption of presumptive concurrence. After all, the stay agreement benefited the appellant not the DCMP.

[26] The revised regulations, which became effective February 6, 2006, identify this provision at § 930.63(c).
[27] Appellant's Ex. L.
[28] Appellant's consultant originally requested the extension in a telephone conversation with the DCMP on October 13, 2006. The DCMP granted the extension over the phone but requested that appellant memorialize the request in writing.

The DCMP's deadlines are based on two scenarios. The first scenario foresees a situation in which appellant does not meet his 90-day deadline. In that case, the DCMP would object to the consistency certification for lack of information. The purpose of this statement was not intended to "strong-arm" appellant. The DCMP was merely stating the law.[29] Additionally, the DCMP was not foreclosing the appellant's consistency certification but informing appellant that he would have to resubmit a new consistency certification, presumably with all of the information necessary for the DCMP to make consistency determination. Once the new consistency certification was submitted, "[t]he project [would] *then* be subject to the full 180-day time period allotted to the DCMP through 15 CFR Part 930 Subpart D for review."[30]

The second scenario considers the DCMP's deadline if appellant provides the requested information as required by the agreement. In that case, "the DCMP will defer a decision on the federal consistency certification until the DNREC Division of Water Resources issues or denies their permit for this project."[31] This approach is sensible since the DCMP's enforceable policies dictate that, when state permits are required for the same project, the state permitting agency's review of the permit applications will become part of the DCMP's consistency determination. More importantly, the enforceable policies clearly state that no consistency determination can issue unless the applicant has received all necessary permits.[32] In this case, appellant did provide that timely information, and, therefore, the second scenario controls the DCMP's deadline.

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[29] § 930.63(c).
[30] Appellant's Ex. I (emphasis added).
[31] Appellant's Ex. I.
[32] Delaware Coastal Management Program, Comprehensive Update and Routine Program Implementation (Aug. 2004)(Respondent's Ex. 5).

The DCMP's deadline was calculable, because it was based on the Water Resources' decision. Section 930.58 of the CZMA regulations provides a checklist of necessary information and data required to start a State's review period. Among that necessary information and data, the regulation includes "[a]ll material relevant to a State's management program."[33] The legislative history is also instructive in this regard. "States may continue to amend their CMP's to describe State specific information necessary to start the CZMA review period for federal license or permit activities and OCS plans."[34]

The DCMP's enforceable policies, which were approved by the Secretary,[35] specifically provide that "[i]f a state permit is required for the same activity, the State permitting agency's review of the permit applications will become part of the DCMP's consistency review."[36] Because the considerations required for the consistency determination and the state permits overlap, the policy of the DCMP to coordinate with the state permitting agency preserves the State's resources and provides the applicant with a cohesive decision-making process.

The DCMP was within its authority to link its consistency decision with the Division of Water Resources' determination as to appellant's subaqueous lands lease, marina permit, and water quality certification required for the project. Moreover, the enforceable policies specifically provide that state permits are required if, *inter alia*, the proposed activity is a marina[37] or occurs on subaqueous lands.[38] These enforceable

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[33] § 930.58(a)(1)(i).
[34] 71 Fed. Reg. 788, 789 (Jan. 5, 2006).
[35] Respondent's Ex. 6.
[36] *See supra* note 32.
[37] *Id.* at p. 33, ¶ 2. "No person shall construct, install, modify, rehabilitate, or replace a marina unless such person has a valid permit issued by the DNREC pursuant to the State of Delaware Marina Regulations."
[38] *Id.* at p. 38, ¶ 21.

policies were enacted in conjunction with the authority of the corresponding state regulations.[39]

Without the stay agreement, the DCMP would have been compelled to object to the consistency certification for lack of information. Because the project was being revised in conjunction with the state permitting process, the DCMP did not have the necessary information and data required to make a consistency decision, according to 15 C.F.R. § 930.58 and the DCMP's enforceable policies.

Appellant freely entered into the stay agreement, which did not benefit the DCMP but accommodated appellant, who was required to modify the project based on the state permitting process. It was this project modification that gave rise to the DCMP's need for additional information and made appellant's consistency certification deficient. Appellant now attempts to reject the stay on a procedural basis while, at the same time, maintaining its benefits by arguing that he was not afforded the time frame he alleges that the stay provided.

The Department requests that the Secretary confirm the DCMP's objection to the appellant's federal consistency statement and not reject it based on an alleged threshold procedural flaw. The Department respectfully requests that the Secretary's decision as to consistency of appellant's project with the CZMA be decided on the merits.

[39] *Id.*

II. Appellant's Marina Project is not Consistent with the Objectives of the Coastal Zone Management Act.[40]

The Secretary may override the State's objection only if he finds that the appellant's proposed activity is consistent with the objectives of the CZMA or is necessary in the interest of national security.[41] In the present matter, the DCMP's objection to appellant's consistency certification should be upheld, because the proposed marina is not consistent with the objectives and purposes of the CZMA. The appellant concedes that the project is not necessary in the interest of national security.

As defined by statute, a project requiring a federal license or permit is consistent with the CZMA if it satisfies all of the following requirements:

> (a) The activity furthers the national interest as articulated in §302 or §303 of the Act, in a significant or substantial manner.
>
> (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.
>
> (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. The Secretary may consider but is not limited to considering previous appeal decisions, alternatives described in state objection letters and alternatives and other information submitted during the appeal. The Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.[42]

[40] *See* 16 U.S.C. § 1456(c)(3)(A).
[41] § 930.130.
[42] § 930.121

1. Appellant's Proposed Marina Project Does Not Further the National Interest in a Significant or Substantial Manner.

A proposed activity will contribute to the national interest in a "significant and substantial" manner when it contributes to "the national achievement of the objections [sic][43] described in sections 302 and 303 of the CZMA 'in an important way or to a degree that has a value or impact on a national scale.'"[44] In order to further determine if a project is "significant or substantial," the regulations provide more guidance by establishing three factors to consider: "(1) the degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the proposed activity is coastal dependent.'"[45] Appellant's project does not satisfy any of the criterion.

In what can be fairly characterized as wishful thinking, appellant shamefully insists that its proposed activity furthers the national interest as articulated in §§ 302 and 303 of the Act in a significant or substantial manner. Respondent submits, however, that no reasonable factfinder could agree with appellant's contention no matter how much they might argue to the contrary.

Appellant claims to be revitalizing the "marina." The fact is that no viable marina exists to be revitalized. The reason no viable marina exists to be revitalized is that the former marina at this location was destroyed by a coastal storm in 1992. Not withstanding the obvious conclusion that this location is prone to and extremely susceptible to storm damage, appellants asked DNREC to permit the project in the same

[43] This is likely a typographical error in the decision and should be "objectives."
[44] *Connecticut v. U.S. Dept. of Commerce*, 2007 WL 2349894, at *7 (D. Conn.)(*quoting* 65 Fed. Reg. 77124, 77150 (2000)) (Respondent's Ex. 7).
[45] *Id.*

location where a previous marina was destroyed by a coastal storm. Section 303(2)(b), however, declares as the national policy that state coastal management programs should provide for

> the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be effected by or vulnerable to sea level rise, land subsidence, and salt water intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.

Respondent contends that this statement of policy is a codification of the common sense suggestion that we, as a society, learn from our mistakes and not allow for consecutive erroneous marina siting decisions.

2. Any National Interest Furthered is Heavily Outweighed by the Activities Adverse Coastal Effects Whether Considered Individually or Cumulatively.

Appellant's proposed marina is located on Cedar Creek and the Mispillion River, an area that has been identified as a critical habit for migratory shorebirds.[46] In particular, the red knot, a shorebird with one of the longest-known migrations, has been identified by the United States Fish and Wildlife Services ("USFW") as a threatened species of high magnitude.[47] In 2007, the USFW considered an application for an emergency listing of the red knot as an endangered species.[48] "The red knot meets our

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[46] NJ Div. of Fish & Wildlife, Red Knot - An Imperiled Migratory Shorebird in New Jersey, www.state.nj.us/dep/fgw/ensp/redknot.htm. (Respondent's Ex. 8); *see also* Allan J. Baker, et al., *Rapid Population Decline in Red Knots: Fitness consequences of Decreased Refuelling Rates and Late Arrival in Delaware Bay*, PROCEEDINGS OF THE ROYAL SOCIETY, March 22, 2004 (Respondent's Ex. 9); Lawrence J. Niles, et al., *Update to the Status of the Red Knot Calidris Canutus in the Western Hemisphere*, Feb. 2008, www.defenders.org/resources/publications/programs_and_policy/wildlife_conservation/imperiled_species/red_knot/status_of_the_red_knot_february_2008.pdf. (Respondent's Ex. 10).

[47] U.S. Fish & Wildlife Service, SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM (Apr. 25, 2007), http://ecos.fws.gov/docs/candforms_pdf/r5/B0DM_V01.pdf. (Respondent's Ex. 11)

[48] *Id.*

definition of a species that is a candidate for listing."[49] Although USFW acknowledged that listing the red knot as an endangered species was warranted, the USFW was precluded from doing so "by higher priority listing actions for species at greater risk."[50]

Every year the red knot migrates between its wintering grounds and breeding areas for more than six and a half months of the year.[51] "Each spring, the red knot flies from its wintering areas as far south as Tierra del Fuego, at the southern tip of South America, to its breeding grounds in the Canadian Arctic – a 20,000 mile round trip."[52] The red knot breaks down their migratory marathon into non-stop segments of 1,500 miles or more, faithfully stopping at the same "staging areas" every year.[53]

During the spring migration, the last staging area stopover is on the shore of the Delaware Bay where the red knot rests and replenishes its energy reserves by feeding on horseshoe crab eggs.[54] The ability of the red knot to accumulate sufficient fat reserves during its stay at the Delaware Bay is critical to its survival.[55] After leaving the Delaware Bay, the red knot flies non-stop to its arctic breeding grounds, where it will not have access to available insect food for one to three weeks.[56] If the red knot does not put on sufficient fat reserves at the Delaware Bay stopover, the ability of the red knot to survive the migration and, thereby, continue the reproductive cycle is diminished.[57]

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[49] *Id.* at p. 28.
[50] U.S. Fish & Wildlife Service, NEWS RELEASE (July 20, 2007), www.fws.gov/news/NewsReleases/showNews.cfm?newsId=E486E645-9CED-D287-8D803DE0A02D757A. (Respondent's Ex. 12).
[51] U.S. Fish & Wildlife Service, SHOREBIRDS, THE DELAWARE BAY CONNECTION (Sept. 2006), www.fws.gov/northeast/pdf/shorebirds.pdf. (Respondent's Ex. 13).
[52] *Id.*
[53] U.S. Fish & Wildlife Service, RED KNOT, CALIDRIS CANUTUS RUFA (Aug. 2005), www.fws.gov/northeast/redknot/facts.pdf. (Respondent's Ex. 14).
[54] *See supra* note 51.
[55] *See supra* note 46.
[56] *Id.*
[57] *Id.*

The spring migratory stop at the Delaware Bay is particularly critical, because it is the last stopover before the red knot reaches its Artic breeding grounds.[58] The Delaware Bay, and more specifically the Mispillion Harbor, is critical to the red knot's survival, because it is the "center of the Western Hemisphere's only population of horseshoe crabs."[59] Approximately 80 percent of the migrating red knot use Mispillion Harbor as a feeding and resting stopover during its spring migration from South America to the arctic breeding grounds.[60]

Appellant's claim that there is no scientific or objective evidence to support DCMP's objections based on the project's effect on the area's wildlife and habitat is not accurate. There is ample scientific evidence to demonstrate that Mispillion Harbor is a critical habitat for migratory shorebirds whose populations have been rapidly declining due to the decrease in available habitat caused by beach erosion, coastal development, shoreline protection activities, and human disturbance.[61] In fact, in its denial of the state permits, the Division of Water Resources provided a detailed and scientifically-supported explanation of the adverse environmental effects the project would have on the migratory shorebirds.[62]

Appellant's sole, unsupported claim is that the red knot was not classified by the Shorebird Technical Committee as an endangered or threatened species is also incorrect. The Shorebird Technical Committee is not responsible for listing species as endangered or threatened.

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[58] *See supra* note 51.
[59] *See supra* note 46.
[60] The Conservation Fund, MISPILLION HARBOR: PROTECTING A HAVEN FOR RED KNOTS, www.conservationfund.org/node/449. (Respondent's Ex. 15).
[61] *See supra* note 47.
[62] Respondent's Ex. 4.

Moreover, appellant attempts to mitigate the adverse effects that the proposed marina would have on the Mispillion Harbor by stating that the marina would be built solely on his private property, which the public could access and receive some benefit. This is a mischaracterization. In addition to appellant's private property, the proposed marina would require use of public subaqueous lands.[63] One of the bases for the denial of the project's state permits was that it did not comply with the state's subaqueous lands regulations.[64] As discussed previously, the state permitting agency's decision was part of the DCMP's consistency determination.

In addition, appellant's proposed marina is a commercial project, which appellant is pursuing for financial gain. Appellant's portrayal of the proposed marina as a public asset is not accurate. The proposed marina would only serve a discrete and minuscule portion of the public. Appellant's implication that the public does not have access to Cedar Creek and Mispillion River is also incorrect. Presently, the public has access to Cedar Creek via a public boat launch with eight boat ramps and a parking lot that accommodates 150 vehicles.[65] The marginal public benefit that appellant's project would provide is significantly outweighed by its adverse environmental effects.

Although the DCMP did not provide an alternative to the project, the appellant's proposed marina cannot be considered consistent with the objectives of the CZMA. Appellant cannot establish that the proposed marina furthers the national interest in a significant or substantial manner, nor can he show that the adverse coastal effects are

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[63] Appellant's Ex. A.
[64] Respondent's Ex. 3.
[65] DNREC Online, Delaware Div. of Fish & Wildlife, Fishing Area and Boating Access Site Information, www.dnrec.state.de.us/fw/fisharea.htm.

outweighed by those alleged benefits. The DCMP's objection does not preclude appellant from seeking approval for a more modest project.

CONCLUSION

For the aforementioned reasons, respondent, the Delaware Department of Natural Resources and Environmental Control, respectfully requests that the Secretary uphold the Department's objection to the consistency certification of appellant, G. Walter Swain.

CERTIFICATE OF SERVICE

The undersigned certifies that on April 3, 2008, she caused the attached RESPONDENT'S BRIEF ON APPEAL OF G. WALTER SWAIN UNDER THE COASTAL ZONE MANAGEMENT ACT to be delivered as follows:

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Dated: April 3, 2008